IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.229 OF 2004

Jayesh H. Pandya & others. ... Petitioners.

vs.

Ashok Gupta & others. .... Respondents.

Mr.J.P.Sen i/b. J.D'Silva, for Petitioners.

Ms.Jyoti Chavan, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 26th July,2005

P.C.:-

1. By this petition, the petitioners challenge the Award made by the sole arbitrator dated 19.2.2004. The challenge to the Award is that the objection to the jurisdiction of the Arbitrator on the ground of existence of the arbitration clause has been wrongly decided and that the objection that the sole Arbitrator is biased in favour of the claimant, has not been decided. The learned Counsel appearing for petitioners submits that by letter dated 8th September,2003, the sole

Arbitrator informed the petitioners that by letter dated 28th March,2003 written by Mr.Ashok Gupta to the sole Arbitrator one Rashmikant R. Shah has been appointed as sole Arbitrator to decide the dispute regarding allotment of 8 flats in Suraj Sadan at J.V.P.D.Scheme, Vileparle (West), Mumbai. This letter was replied to by the petitioners by reply dated 15th September,2003. The petitioners pointed out in the reply that the Suraj Sadan project was a joint venture of the petitioners and one Shiv Gupta. The project was completed in the year 1997-98, and that there is no arbitration agreement between the parties. It was also pointed out that though it appears from the letter of the sole Arbitrator that he was appointed by letter dated 28th March,2003, he is writing a letter to the petitioners five months thereafter in September,2003. The further objection was raised that the petitioners have reliably learnt that the sole Arbitrator had rendered professional services to Mr.Ashok Gupta- the claimant and that the sole Arbitrator was colluding with Mr.Ashok Gupta. According to the petitioners, though in the Award the objection as to the existence of the arbitration clause has been decided, the learned Arbitrator has not decided the objection raised to the appointment of the learned Arbitrator on the ground of bias. The learned Counsel for petitioners submitted that the petitioners had addressed a letter to Mr.Ashok Gupta on 1.10.2003 wherein the petitioners had stated that Mr.Ashok Gupta has appointed his close friend and Chartered Accountant as the Arbitrator. According

to the petitioners that letter was replied to by Mr.Ashok Gupta by his letter dated 7.10.2003 wherein Mr.Ashok Gupta denied that the sole Arbitrator is his close friend but he did not deny that the sole Arbitrator was his chartered accountant. The petitioners thus submit that it was an admitted position that the sole Arbitrator had acted in the past as chartered accountant of the claimant. It is further submitted that it is laid down by Section 13 of the Arbitration and Conciliation Act,1996 that an objection as to the bias of the Arbitrator can be raised by sending a written statement to the arbitral tribunal. Sub-section (3) of Section 13 of the Act casts duty on the arbitrator to decide the objection. Therefore, the objection has to be decided by the Arbitral Tribunal by an order. That order may be made separately or may be made in Award. According to the petitioners, there is no order made by the learned Arbitrator rejecting the objection raised by the petitioners as to the bias.

2. On behalf of the Respondents, on the other hand, it was contended that the objection on account of bias has been decided by the learned Arbitrator by his letter dated 19.9.2003. It was also contended that the learned Arbitrator has dealt with the objection also in paragraph no.13 of the Award.

3. Now in the light of these rival submissions if the record is

perused, it becomes clear that the petitioners were informed about the appointment of the learned Arbitrator by letter dated 8.9.2003. Sub-section (2) of Section 13 of the Act gives 15 days time to raise an objection about bias of the arbitrator appointed. Within the period of 15 days from 8.9.2003, by letter dated 15.9.2003 the petitioners by written communication had raised the objection as to the bias of the sole Arbitrator. The objection raised in that letter reads as under:-

> "I am reliably informed that you have in the past rendered professional services to Ashok Gupta. It appears to me that you are colluding with Ashok Gupta in this matter."

Thus, the written objection was raised by the petitioners challenging the appointment of the sole Arbitrator within the time prescribed under sub-section (2) of Section 13 of the Act. Therefore, there was a duty casts by sub-section (3) of Section 13 of the Act on the learned Arbitrator to decide on the challenge. Sub-section (2) and (3) of Section 13 of the Act which are relevant for the present purpose, reads as under:-

> "13. Challenge procedure
>
> (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen

> days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.
>
> (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge."

It becomes clear from perusal of sub-section (2) and (3) of Section 13 of the Act that there is clear statutory duty cast on the Arbitrator to make an order on the challenge as to the appointment of the Arbitrator on the ground of bias. According to the Respondents, the decision of the learned Arbitrator on the challenge as to the appointment of the learned Arbitrator on bias is contained in letter dated 19.9.2003 sent by the learned Arbitrator to the petitioners which reads as under:-

> "I have to inform you that all the allegations made by you against me as an arbitrator in the above matter are totally false and they are unwarranted and uncalled for.

> I have been appointed arbitrator in the above matter on the basis of agreements for allotment dt:-2nd July,1999 in respect of 8 flats No.11A, 11B, 10A, 10B, 14A, 13A, 12A, 12B entered into between Mr.Hitesh H. Pandya and Mr.Shivkumar Gupta (represent by Mr.Jayesh H. Pandya) of the one part and the allottees of the said flats of the other part, now represent by Mr.Ashok Gupta, as the claimant.
>
> Your objection/submission will be dealt with during the course of arbitration proceedings."

Perusal of above quoted letter shows that the learned Arbitrator denied the allegations made against him and he stated that the objection raised by the petitioners will be dealt with during the course of arbitration proceedings. Thus, even according to the learned Arbitrator the decision on the objection was not contained in the letter dated 19.9.2003 as quoted above and the decision was to be made during the course of the arbitration proceedings. I have not been pointed out that the decision made by the learned Arbitrator at any point of time during the course of the arbitration proceedings. The contention is that the learned Arbitrator has dealt with the objection in paragraph 13 of the Award. Paragraphs 13 and 14 of the Award read as under:-

"13. The respondent no.1 and 3 have questioned the appointment of this arbitral tribunal in the correspondence addressed by them to the Claimants which is evident from Exhibit C-26 filed by the claimant with his examination in chief dated 15.01.2004 and also from the letters addressed by Respondents No.1 and 3 to the arbitral tribunal.

14. The Respondents No.1 and 3 have vehemently denied having executed any such agreement with the claimants and have also disputed the contents of the agreement of allotment dated 7.2.1999. However, respondents No.1 & 3 failed and neglected to appear before the Arbitral Tribunal to substantiate their alleged claim of not having executed any such agreement of allotment or to disprove the contents written in the agreement. They have continuously denied in correspondence the genuineness of appointment of this Arbitral Tribunal as sole arbitrator and they have just abstained from attending to the arbitration proceedings. The Respondents no.1 & 3 have thus neither attended the arbitration proceedings nor have they furnished any documents, evidence to

> refute the claims of the claimants nor they have provided any material to show that agreements and other documents furnished by the claimants are forged or fabricated. The Respondent no.2 attended twice and furnished certain documents and has requested not to pass any order of recovery against him since he was not able to depose before this arbitral tribunal due to the threat given by the Respondents no.1 & 3 to him. I am not convinced by the contention made by Respondent No.2.

Perusal of the above quoted paragraphs 13 and 14 show that these paragraphs dealt with the objection raised by the petitioners to the existence of the arbitration clause between the parties. Paragraphs 13 and 14 do not at all deal with the objection raised on the ground of bias of the sole Arbitrator. It is thus clear that though the Law obliges the sole Arbitrator to decide the objection and though he had promised by letter dated 19.9.2003 to decide the objection, he has not decided the objection as regards the bias. I also find considerable force in the contention raised by the learned Counsel appearing for the petitioners that in fact the petitioners have not denied that the sole Arbitrator had worked as their Chartered Accountant in the past. By letter dated 1.10.2003 addressed to Mr.Ashok Gupta, a clear allegation

was made that the sole Arbitrator was a close friend of Mr.Ashok Gupta and was also his Chartered Accountant. This letter was replied to by reply dated 7.10.2003. In that reply Mr.Ashok Gupta merely denied that the sole Arbitrator was his close friend. There is no denial of allegation that the sole Arbitrator has worked as his Chartered Accountant in the past. Therefore, I find that the objection that was raised on the ground of bias was not a frivolous objection but it had some substance. Therefore, the learned Arbitrator was under a duty to decide the same.

4. So far as the other challenge to the Award on the ground of absence of .arbitration clause between the parties is concerned, in my opinion, the learned Arbitrator is justified in rejecting the objection because the petitioners have not participated in the arbitration proceedings and have not led any evidence. In my opinion, however, failure of the learned Arbitrator to decide the objection raised as to the bias of the Arbitrator vitiate the Award. The learned Arbitrator has failed to perform the statutory duty imposed on him by the provisions of sub-section (3) of Section 13 of the Arbitration and Conciliation Act,1996, and therefore, the Award is vitiated and is liable to be set aside. In the result, therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside.